

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs at Jackson June 6, 2006

STATE OF TENNESSEE v. LUTHER MELVIN JOHNSON II

Direct Appeal from the Criminal Court for White County
No. CR1668 Leon C. Burns, Jr., Judge

No. M2004-02810-CCA-R3-CD -Filed July 28, 2006

The defendant, Luther Melvin Johnson II, who had been indicted for aggravated burglary, attempted theft, assault, and criminal impersonation, was convicted of criminal trespass, a Class C misdemeanor, which is a lesser included offense of aggravated burglary. See Tenn. Code Ann. § 39-14-405 (2003). The trial court imposed a sentence of thirty days, allowing the defendant to serve his sentence on consecutive weekends. See Tenn. Code Ann. § 40-35-302(d) (2003). In this appeal, the defendant alleges that the evidence is insufficient to support the conviction and that the trial court erred by failing to instruct the jury on the defenses of ignorance or mistake of fact and necessity. The judgment of the trial court is affirmed.

Tenn. R. App. P. 3; Judgment of the Trial Court Affirmed

GARY R. WADE, P.J., delivered the opinion of the court, in which DAVID H. WELLES and J.C. McLIN, JJ., joined.

Gary N. Lovellette, Cookeville, Tennessee, for the appellant, Luther Melvin Johnson II.

Paul G. Summers, Attorney General & Reporter; Leslie Price, Assistant Attorney General; William E. Gibson, District Attorney General; and Beth Willis, Assistant District Attorney General, for the appellee, the State of Tennessee.

OPINION

At approximately 11:20 a.m. on July 14, 2003, the victim, Joey Portilla, left his employment at Flowserve in Cookeville, Tennessee. When he arrived at his mobile home in White County, he observed an unfamiliar, white, four-door Buick parked in his driveway. Because he was not expecting visitors, especially at a time he was ordinarily at work, he "pulled up right behind" the vehicle and wrote down the license tag number. He recognized neither the vehicle nor its license tag number. The key had been left in the ignition of the Buick. When the victim looked toward his residence, he noticed that the back door was, "busted in . . . about six inches [and] mushroomed out

where the door handle is." He saw "a shadow go by the window, [and] right then . . . knew somebody was in there."

At that point, an individual later identified as the defendant, Luther Melvin Johnson II, emerged from the residence wearing "khaki pants and a white shirt." When asked "what he was doing in [the] house," the defendant replied that "he was the police." When the victim disputed the claim, the defendant "started coming towards" him. The victim ran toward the defendant's vehicle, grabbed the keys, and got inside in order to prevent him from leaving. When the defendant "would not let [him] out of the car" and demanded the keys, the frightened victim dropped the keys and stepped out of the vehicle. The defendant "pointed his finger" toward the victim, "sort of gritted his teeth, and" angrily sped out of the driveway. The victim called 911 and provided the emergency operator with a license tag number and a description of his assailant's vehicle.

When the victim left his residence at 4:30 a.m. on the date of the offense, the laundry basket was "on top of the washing machine" and contained only "dirty towels." While he was away, the basket had been moved to the floor at his bedroom door. It contained "my wife's undergarments, lingerie . . . bras . . . panties . . . an adult video . . . and I believe there was like panty hose and stuff like that." "[A]ll of the drawers" in his wife's dresser had been "pulled out . . . and the top two [drawers] where she normally kept her panties, undergarments, lingerie, [and] pantyhose [were] empty." One of the two "small dogs" that he and his wife kept "in little pet taxis" on the floor had been moved to the bed.

Some twenty minutes after the defendant had left the residence, Detective Tommy Simmons of the White County Sheriff's Department summoned the victim to identify the defendant and his vehicle. The defendant, who had apparently changed clothes and was dressed in "shorts and a t-shirt," was then taken into custody.

At trial, Tonya Portilla, the wife of the victim, testified that she had left their residence at approximately 8:00 a.m. to visit her grandmother. She described herself as "a very clean person" and stated that when she left, the residence was neat and the two dogs were "in their pet taxis . . . in the bedroom floor beside the dresser." She expressed certainty that she had closed and locked the back door.

Putnam County Sheriff's Department Detective Randy Roland, who was on routine patrol that day, testified that he received a dispatch on a white Buick complete with vehicle description, license tag number, and the address of the owner. Detective Roland recalled that when he located the vehicle at the residence of its registration, the defendant was the only individual present. He testified that Detective Tommy Simmons of the White County Sheriff's Department arrived at the scene while the defendant was being questioned.

Detective Simmons testified that when he transported the victim to the defendant's residence in Putnam County, the victim readily identified the defendant as the individual who had burglarized

his home. The state stipulated that nothing of an incriminating nature was found on the defendant's property.

Hoyt Eugene Phillips, a forensic scientist with the Tennessee Bureau of Investigation (TBI) Crime Laboratory, examined an adult videotape and screwdriver that were seized from the victim's residence. He was unable to find any latent fingerprints that linked the defendant to the crime scene. Agent Phillips testified, however, that "just because there's no fingerprints . . . on that videotape, [that] does not exclude him from ever touching that tape."

April Johnson, the wife of the defendant, testified for the defense. She claimed that she had never "run across any strange underwear" at their residence. She described the defendant as "a very good provider."

The defendant testified that he sold "pre-need cemetery property and merchandise" on a "door to door" basis at the time of the incident. He contended that his only business "on the day I knocked on Mr. Portilla's door" was to "try to sell cemetery plots, mausoleums, [or] memorials." The defendant claimed that when he arrived at the residence, he "noticed that the back door . . . was opened probably six to eight inches to a foot." He claimed that as he was knocking on the door, he "heard what [he] thought was somebody trying to get up . . . like scratching or trying to get up out of the floor in a back room." He explained that because the majority of his customers were elderly, he made "a judgment call to step in the doorway" and called out to ask if anybody was in the home. The defendant explained that in the thirteen years in which he had been involved in door to door sales, he had multiple occasions to "enter a home and help someone." He contended that he entered the victim's residence only because he "thought somebody might be hurt" and in need of his assistance. The defendant denied telling the victim that he was a policeman. He instead claimed that after he exited the residence, the victim exclaimed, "I'm calling the police." The defendant testified that he challenged the victim to "call the police" and denied being the person who had been referred to as the "Underwear Bandit."

I. Sufficiency of the Evidence

In this appeal, the defendant first asserts that the evidence was insufficient to support his conviction. He contends that the state failed to prove all the elements of criminal trespass beyond a reasonable doubt. On appeal, of course, the state is entitled to the strongest view of the evidence and all reasonable inferences which might be drawn therefrom. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. Crim. App. 1978). The credibility of the witnesses, the weight to be given their testimony, and the reconciliation of conflicts in the proof are matters entrusted to the jury as trier of fact. Byrge v. State, 575 S.W.2d 292, 295 (Tenn. Crim. App. 1978). When the sufficiency of the evidence is challenged, the relevant question is whether, after reviewing the evidence in the light most favorable to the state, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Tenn. R. App. P. 13(e); State v. Williams, 657 S.W.2d 405, 410 (Tenn. 1983). Because a verdict of guilt removes the presumption of innocence and raises a presumption of guilt, the convicted criminal defendant bears the burden of showing that the evidence

was legally insufficient to sustain a guilty verdict. State v. Evans, 838 S.W.2d 185, 191 (Tenn. 1992).

The defendant was convicted of criminal trespass as a lesser included offense of aggravated burglary. See Tenn. Code Ann. §§ 39-14-402, -405 (2003); State v. Burns, 6 S.W.3d 453, 469 (Tenn. 1999). A person is guilty of criminal trespass who "knowing the person does not have the owner's effective consent to do so, enters or remains on property, or a portion thereof." Tenn. Code Ann. § 39-14-405(a) (2003). "'Knowing' refers to a person who acts knowingly with respect to the conduct or to circumstances surrounding the conduct when the person is aware of the nature of the conduct or that the circumstances exist." Tenn. Code Ann. § 39-11-302(b) (2003).

Here, the evidence presented by the state established that the defendant knowingly entered the victim's residence without the owner's effective consent. The victim testified that he observed the defendant leave his residence. Neither Portilla nor his wife knew the defendant or had ever invited him into their home. The defendant admitted entering the Portilla's residence without permission, claiming that he believed there was an emergency. In our view, this was a classic credibility question, falling well within the purview of the jury. The jury rejected the defendant's explanations, which was its prerogative. The verdict resolved the conflicts in the testimony in favor of the state. See State v. Summerall, 926 S.W.2d 272, 275 (Tenn. Crim. App. 1995). Under these circumstances, the evidence was sufficient to support the conviction.

II. Jury Instructions

Next, the defendant argues that the trial court erred by failing to instruct the jury on the defenses of ignorance or mistake of fact and necessity. Under the United States and Tennessee Constitutions, a defendant has a constitutional right to trial by jury. See U.S. Const. amend. VI; Tenn. Const. art. I, § 6.; see also, State v. Bobo, 814 S.W.2d 353, 356 (Tenn. 1991); Willard v. State, 130 S.W.2d 99 (Tenn. 1939). This right encompasses the defendant's right to a correct and complete charge of the law. See State v. Teel, 793 S.W.2d 236, 249 (Tenn. 1990). In consequence, the trial court has a duty "to give a complete charge of the law applicable to the facts of a case." State v. Harbison, 704 S.W.2d 314, 319 (Tenn. 1986); see State v. Teel, 793 S.W.2d 236, 249 (Tenn. 1990); see also, Tenn. R. Crim. P. 30.

Our law requires that all elements of each offense be described and defined in connection with that offense. See State v. Cravens, 764 S.W.2d 754, 756 (Tenn. 1989). When the evidence in the record fairly raises or supports the existence of a defense, the trial court is compelled to instruct the jury on the issue. See Manning v. State, 500 S.W.2d 913, 915-16 (Tenn. 1973); see also Almonrode v. State, 567 S.W.2d 184, 187 (Tenn. Crim. App. 1978). As part of its instruction, the trial court must inform the jury that any reasonable doubt on the existence of the defense requires acquittal. See Tenn. Code Ann. § 39-11-203(c); see also, State v. Bult, 989 S.W.2d 730, 733 (Tenn. Crim. App. 1998); State v. Shropshire, 874 S.W.2d 634, 639 (Tenn. Crim. App. 1993). This court has added that "due process requires that a criminal defendant be afforded a meaningful opportunity to present a complete defense, which includes the right to have the jury instructed regarding

fundamental defenses raised by the evidence." State v. Michael S. Nevens, No. M2000-00815-CCA-R3-CD slip op. at 7 (Tenn. Crim. App., at Nashville, April 27, 2001); see also Tenn. Code Ann. § 39-11-203(c), (d) (2003).

Whether the evidence has raised a defense and, therefore, requires a jury instruction depends upon an examination of the evidence in the light most favorable to the defendant. See Bult, 989 S.W.2d at 733. The instructions should include a charge on the defense of ignorance or mistake of fact or necessity if the facts would fairly support either. Because ignorance or mistake of fact and necessity are not classified by our code as affirmative defenses, the defendant need not prove them by a preponderance of the evidence. See State v. Culp, 900 S.W.2d 707, 710 (Tenn. Crim. App. 1994). Where the proof, however, "fairly raises" the defense, the trial court "must submit the defense to the jury and the prosecution must 'prove beyond a reasonable doubt that the defense does not apply.'" Id. (quoting State v. Hood, 868 S.W.2d 744 (Tenn. Crim. App. 1993)).

A. Mistake of Fact

The defendant alleges that the mistake of fact was his belief that "an older person" was in the victim's residence and in need of his assistance. Because he claims this was a reasonable belief, the defendant cites Tennessee Code Annotated section 39-11-609 and argues that his mistake of fact negated the requisite culpable mental state of criminal trespass. He complains that the trial court should have provided the jury with an instruction on mistake of fact.

"[I]gnorance or mistake of fact is a defense to prosecution if such ignorance or mistake negates the culpable mental state of the charged offense." Tenn. Code Ann. § 39-11-502(a) (2003). The trial court must instruct the jury on the defense if it is fairly raised by the proof. See Tenn. Code Ann. § 39-11-203(a), (c). The Sentencing Commission Comments provide that ignorance or mistake of fact "is a narrow defense." See Tenn. Code Ann. § 39-11-502 (2003), Sentencing Comm'n Comments. For a criminal trespass conviction, a defendant must "enter or remain on property, or a portion thereof, knowing the person does not have the owner's effective consent to do so." Tenn. Code Ann. § 39-14-405(a) (2003). As explained, "'[k]nowing' refers to a person who acts knowingly with respect to the conduct or to circumstances surrounding the conduct when the person is aware of the nature of the conduct or that the circumstances exist." Tenn. Code Ann. § 39-11-302(b) (2003); see also State v. Guy, 165 S.W.3d 651, 660 n.2 (Tenn. Crim. App. 2004).

Here, the defendant contended that he "noticed that the back door . . . was opened probably six to eight inches to a foot." He claimed that he had "knocked on several occasions" and then "made a judgment call to step in the doorway." The defendant acknowledged that he lacked consent to enter the property. See Tenn. Code Ann. § 39-14-405(2)(a) (2003) (permitting knowledge of a lack of effective consent to be inferred where notice against entering is given by "[f]encing or other enclosure obviously designed to exclude intruders"). He claimed, however, that his experience as a door to door salesman led him to believe there was a problem. He contended the door was ajar and, because he heard scratching inside, he suspected someone might be hurt. Although the claim was perhaps far-fetched under these particular circumstances, whether consent was implicit because

someone inside was in need of assistance was, in our view, a question of fact for the jury. An instruction on ignorance or mistake of fact was warranted. See Tenn. Code Ann. § 39-11-203(c) (2003).

When the error is of constitutional dimensions, as in this instance, reversal is required unless the error is harmless beyond a reasonable doubt. See State v. Harris, 989 S.W.2d 307, 314-15 (Tenn. 1999). Jury instructions must be reviewed in the context of the overall charge rather than in isolation. See Sandstrom v. Montana, 442 U.S. 510 (1979); see also State v. Phipps, 883 S.W.2d 138, 142 (Tenn. Crim. App. 1994). A charge is prejudicial error "if, when read as a whole, it fails to fairly submit the legal issues or misleads the jury as to the applicable law." Phipps, 883 S.W.2d 142 (citing In re Estate of Elam, 738 S.W.2d 169, 174 (Tenn. 1987)).

Charged with aggravated burglary and other crimes, the defendant was convicted of criminal trespass, a lesser included offense. His defense was that he entered the victim's residence thinking someone needed assistance. He explained that he "was not in there [but] a very few seconds." That the defendant was observed leaving the victim's residence without the owner's consent to be inside was direct evidence of his guilt. Of equal importance is that the defendant acted furtively when confronted by the victim. It is undisputed that he drove away without waiting for the police. He had offered no explanation to the victim as to his presence. When he left, the defendant was wearing khaki pants and a white shirt. He traveled to his Putnam County residence and changed into shorts and a t-shirt before police arrived. While he initially denied that he had been in White County, the defendant contradicted himself at trial. He acknowledged that he had been in White County and admitted that he was inside the victim's residence. These acts are especially probative of the defendant's guilt of a criminal trespass. Obviously, the jury gave some credence to claims of the defense. The defendant was acquitted of the burglary, theft, assault, and criminal impersonation. Under all of the circumstances, however, the proof of criminal trespass was so overwhelming that the trial court's failure to instruct on the narrow defense of mistake of fact can be classified as harmless beyond a reasonable doubt. See State v. Richmond, 90 S.W.3d 648, 662 (Tenn. 2002).

B. Necessity

Necessity is a defense wherein conduct, otherwise unlawful, "is justified if . . . [t]he person reasonably believes the conduct is immediately necessary to avoid imminent harm; and . . . [t]he desirability and urgency of avoiding the harm clearly outweigh, according to ordinary standards of reasonableness, the harm sought to be prevented by the law proscribing the conduct." Tenn. Code Ann. § 39-11-609 (2003). The Sentencing Commission Comments to this section state that the defense of necessity is applicable "in those exceedingly rare situations where criminal activity is an objectively reasonable response to an extreme situation." Tenn. Code Ann. § 39-11-609 (2003), Sentencing Comm'n Comments. The Sentencing Commission provides an example as follows: "The necessity defense would bar a trespass conviction for a hiker, stranded in a snowstorm, who spends the night in a vacant cabin rather than risking death sleeping in the open." Id.

Necessity has traditionally been used appropriately when the extreme situation is brought on by something other than a human act. See Neil P. Cohen et al., Prevalence and Use of Criminal Defenses: A Preliminary Study, 60 Tenn. L. Rev. 957, 966 (1993). Examples of necessity include a ship violating an embargo law to avoid a storm, a pharmacist providing medication without a prescription to alleviate someone's suffering during an emergency, or one of two shipwrecked sailors pushing the other off the float to save his own life. See 11 David L. Raybin, Tennessee Practice § 28.118 (1985 & Supp. 1997). This court has held that in order for a defendant to be entitled to the defense of necessity, he "must show an immediately necessary action, justifiable because of an imminent threat, where the action is the only means to avoid the harm." State v. Watson, 1 S.W.3d 676, 678 (Tenn. Crim. App. 1999) (citing State v. Green, 915 S.W.2d 827, 832 (Tenn. Crim. App. 1995)).

In State v. Green, this court ruled that because the statutory provision is a codification of the common law, common law distinctions between the defenses of necessity and duress are instructive:

"Duress was said to excuse criminal conduct where the actor was under an unlawful threat of imminent death or serious bodily injury, which threat caused the actor to engage in conduct violating the literal terms of the criminal law. While the defense of duress covered the situation where the coercion had its source in the actions of other human beings, the defense of necessity, or choice of evils, traditionally covered the situation where physical forces beyond the actor's control rendered illegal conduct the lesser to two evils. Thus, where A destroyed a dike because B threatened to kill him if he did not, A would argue that he acted under duress, whereas if A destroyed the dike in order to protect more valuable property from flooding, A could claim a defense of necessity.

995 S.W.2d 591, 606 (Tenn. Crim. App. 1998) (quoting United States v. Bailey, 444 U.S. 394, 409-10 (1980)). The defense of necessity is generally only available when nonhuman acts prompt the illegal action. See State v. Davenport, 973 S.W.2d 283, 287 (Tenn. Crim. App. 1998) (citing Neil P. Cohen et al., Prevalence and Use of Criminal Defenses: A Preliminary Study, 60 Tenn. L. Rev. at 966).

The defendant in this instance claimed that he reasonably suspected that someone inside the residence was in need of assistance. Although he was not under an immediate physical threat, the defense is not limited to the protection of the defendant. It was the defense theory that the criminal trespass was necessary in order to prevent harm to an occupant of the residence. Of course, no one was in need of assistance at the White County residence. No one was in immediate danger of harm and there is no objective evidence to suggest otherwise. There was no proof that the defendant was compelled to enter the residence by any nonhuman act. Other circumstances establish that the intentions of the defendant were not honorable. In our view, there was no error.

Accordingly, the judgment of the trial court is affirmed.

GARY R. WADE, PRESIDING JUDGE